the second. Id. (1907) 67 Atl. 399. The use of the process itself here constituted a continuing fraud and the case, therefore, falls within the class already discussed. The result reached in the lower court was consequently correct on both points, whereas its line of reasoning on the second point, and the result reached in the higher court on the first point, were erroneous.

ADMISSIBILITY OF SELF-SERVING CLAIMS OF TITLE.—In a recent case in Kansas, *Hubbard* v. *Cheney* (1907) 91 Pac. 793, there was a controversy between the heirs of a husband and wife as to whether a deed purporting to convey land to said husband and wife jointly was in fact a mortgage as to the wife. Self-serving declarations of the husband, made while in possession, were admitted "to illustrate and qualify the possession" and the court distinguished these from declarations of the wife which were admitted as against interest. In actions involving title possession may be a material fact as it is *prima facie* evidence of title, *Roebke* v. *Andrews* (1870) 26 Wis. 311, 317, or, as sometimes put, raises a "presumption" of title. Sedgwick & Wait, Trial of Title to Land, § 717; Best, Evid. § 366. As showing such possession the conduct or physical occupation or custody of the property is clearly admissible. The intent or frame of mind which accompanies the conduct is a part of it because it characterizes it and in such capacity becomes relevant and admissible. Words of claim of title evidence this frame of mind, and, since they are not offered as proof of the truth of the fact asserted, are clearly beyond application of the Hearsay Rule. Wigmore, Evid. § 1768. The conduct plus the words forms a "verbal act," Wigmore, Evid. § 1772, or as it is often stated, the words are a part of the *res gestæ*. *Bunnell* v. *Studebaker* (1882) 88 Ind. 338; Taylor, Evid. § 580 *et seq.* It follows that the utterance must be strictly concurrent in time with the conduct which it covers, and in this it differs from a statement admissible under the rule with regard to spontaneous utterances, for the latter are regarded as proof of the truth of the fact asserted and as exceptions to the Hearsay Rule, and hence it need not be synchronous with any physical conduct. Clearly also the words would not be admissible independently, for they could then be relevant only as hearsay. Many cases have overlooked the fact that claim of title by one in possession of property is part of the "verbal act" including occupation or custody and have excluded evidence of such claim as hearsay, not being a declaration against interest. *Waring* v. *Warren* (N. Y. 1806) 1 Johns. 340; *Fischer* v. *Bergson* (1874) 49 Cal. 294. Other decisions have repudiated the verbal act theory as applied to this class of cases on the ground that it is "receiving the unsworn declarations of the party in his own favor." *Holmes* v. *Sawtelle* (1865) 53 Me. 179; *Kyle's Adm'r* v. *Kyle* (1864) 15 Oh. St. 15; semble, *Ware* v. *Brookhouse* (1856) 7 Gray 454; *Roebke* v. *Andrews, supra* (dissenting opinion). But the great weight of authority upholds the theory, *Reiley* v. *Haynes* (1888) 38 Kan. 259; *Avery* v. *Clemons* (1847) 18 Conn. 306, 309; *Roebke* v. *Andrews, supra; Amick* v. *Young* (1873) 69 Ill. 542, 544, and at least two jurisdictions have abandoned opposing doctrines in its favor. *R. R. Co.* v. *Clark* (1878) 68 Mo. 371; *Lemmon* v. *Hartsook* (1883) 80 Mo. 13; cf. *Darrett* v. *Donnelly* (1866) 38 Mo. 492; *Criddle's Adm'r* v. *Criddle* (1855)

21 Mo. 532; *Watson* v. *Bissell* (1858) 27 Mo. 220; *Creighton* v. *Hoppis* (1884) 99 Ind. 369; cf. *Travis* v. *Barkhurst* (1853) 4 Ind. 171.

It has been urged, that the declarations are inadmissible under this theory unless the conduct to characterize which they are offered is "equivocal or incomplete as a legal act." Wigmore, Evid. § 1774. Of course if the conduct apart from the utterance is a complete legal act in itself then the utterance cannot strictly form a part of that act, but so long as the utterance characterizes the conduct it would seem that the act is incomplete without it. Equivocality of the conduct, therefore, should become material in principle only in determining whether evidence of the utterance is cumulative, and the conduct should be held unequivocal when there can be no reasonable doubt as to its significance. The necessity of equivocality is not recognized by many text writers, 1 Greenleaf, Evid. (15th ed.) §§ 109, 110; Taylor, Evid. § 580 *et seq.;* Best, Evid. § 408 *et seq.,* and the cases seem to disregard it. *Lund* v. *Tyngsborough* (Mass. 1851) 9 Cush. 36, 42; *Wright* v. *Tatham* (1838) 7 A. & E. 313, 361. This may be due to the fact that in this class of cases the conduct is usually equivocal. See cases cited *supra.* But those decisions which touch upon the point either merely state that the conduct was ambiguous and needed explanation, *Cooper* v. *State* (1879) 63 Ala. 80; *Creighton* v. *Hoppis, supra; Lewis* v. *Burns* (1895) 106 Cal. 381 or were cases where the conduct involved was a complete legal act by itself apart from the utterance which accompanied it. Semble, *Shuck* v. *Vanderventer* (Ia. 1854) 4 Greene 264, 265. Thus it would seem that although conduct is otherwise well characterized, the utterance which goes to make up the relevant act should nevertheless be admitted, even though the practical consequence is that the utterance is useful chiefly as hearsay, unless barred by the cumulative rule.

FEDERAL POWER UNDER THE ADMIRALTY AND INTERSTATE COMMERCE CLAUSES.—Two conditions would seem necessary to give Federal courts jurisdiction under the Interstate Commerce clause of the United States Constitution: first, Congressional legislation; second, legislation regulative of interstate commerce. The first requisite, enforced in the days of Chief Justice Marshall, *Wilson* v. *Black etc. Co.* (1829) 2 Pet. 245, has been modified to the extent that, as to matters in which uniformity of legislation is necessary from the nature of the subject, the power of Congress is exclusive, and therefore State legislation upon such subjects is unconstitutional *per se,* whereas as to other matters the power of Congress is only paramount. *Cooley* v. *Board of Wardens* (1851) 12 How. 299; *Robbins* v. *Shelby Taxing District* (1886) 120 U. S. 489. The second requisite has been liberally construed so as to include not only the regulation of "commerce" in its narrow sense, but also of the conditions surrounding it. *Leovy* v. *United States* (1900) 177 U. S. 621. Since commerce includes navigation, *Gibbons* v. *Ogden* (1824) 9 Wheat. 1, the determination of what surrounding conditions are proper subjects of the power of Congress has necessitated a definition of "navigable waters of the United States." It has been decided that such water is that which may in its ordinary condition be made practically useful for the prosecution of interstate commerce,